KGN JAYA SDN. BHD.

v.

PAN RELIANCE SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
TUAN SRI GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA
DATO' AHMAD FAIRUZ SHEIKH ABDUL HALIM J
[CIVIL APPEAL NO. P-02-272-94]
18 JANUARY 1996

CONTRACT: *Agency - Agency agreement - Whether must necessarily be in writing - Relationship of principal and agent - Whether could be implied - Whether could arise by conduct - Contracts Act 1950 Chapter X.*

CIVIL PROCEDURE: *Pleadings - Defence - Plea of pure denial that any sub-agency had existed - Plea followed by allegation that sub-agency was illegal - Allegation not taken as alternative plea - Whether an embarrassing pleading - Effect.*

INSURANCE: *Insurance agent - Sale of policies - Agent appointing sub-agent - Collection of premiums - Liability of sub-agent.*

The respondent, an insurance agent for Merchantile Insurance Sdn. Bhd., claimed to have appointed the appellant as its sub-agent to sell policies of the latter. The respondent alleged that by the appointment, the appellant was authorised *inter alia* to receive premiums in respect of the cover notes it had sold, but was obliged to submit the sums collected to the respondent after deducting the commission due to it. The respondent further alleged that the appellant had failed to remit to it the premiums so collected and so made a demand for the same amounting to RM175,024.41. Following the appellant's denial of any knowledge of the claim the respondent issued a writ and subsequently moved for summary judgment.

The appellant did not dispute that between 1990 and 1991 statements of account were sent to it by the respondent. Before the learned Judge, the appellant again pleaded pure denial. However, having pleaded that, the appellant went on to plead, *in seriatim*, that the agency was illegal, having contravened the Co-operative Societies Act 1948 and the Insurance Act 1963. The learned Judge found no triable issues and accordingly entered judgment for the respondent. In this appeal, the appellant argued that summary judgment had been wrongly entered as the Judge, *inter alia*, had overlooked the point that there was no written agreement to support the claim that the appellant had been appointed as the respondent's sub-agent.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] The way in which the appellant pleaded its case reveals a singular inconsistency of approach. By no stretch of imagination could it be said that a sub-agency agreement which, according to the defence, never existed could be illegal. Clearly, the defence was delivered only to delay the respondent from obtaining judgment in the action.

[2] The appellant's arguments were devoid of merit. The law does not require that an agency or sub-agency agreement must be in writing. Part X of the Contracts Act 1950 does not contain any requirement that the appointment of an agent or sub-agent has to be in writing. Hence, the appointment may be express or implied, that is to say, it may be gathered from the facts and circumstances of a case and from the conduct of the parties. In any words, a party may by his conduct in all the circumstances of a partricular case, be estopped from asserting the absence of an agency relationship between him and he who claims to be his principal.

[3] In the instant case the appellant conceded that it did indeed receive statements of account from the respondent. It follows that a reasonable man similarly circumstanced as the appellant would, if it were really true that there had been no appointment of sub-agency, have sent back these accounts to the respondent and denied any liability. The appellant did not do this but held onto the accounts and did nothing about it.

[4] The appellant, by its silence coupled with the other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having done so, it ought not to be permitted to now contend otherwise.

[Appeal dismissed. Summary judgment of Court below affirmed]

***[Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Ejensi - Perjanjian ejensi - Samada seharusnya dalam bentuk bertulis - Perhubungan pihak utama dan ejen - Samada boleh wujud secara tersirat - Samada boleh berbangkit melalui kelakuan - Akta Kontrak 1950 Bab X.*

***PROSEDUR SIVIL:** Pliding - Pembelaan - Penafian semata-mata bahawa suatu ejensi kecil telah wujud - Penafian diikuti oleh pengataan bahawa ejensi kecil adalah haram - Pengataan tidak dibuat dalam bentuk alternatif - Samada merupakan suatu pliding yang memalukan - Kesan.*

***INSURANS:** Ejen insurans - Penjualan polisi-polisi - Ejen melantik ejen-kecil - Pengutipan premium - Tanggungan ejen-kecil.*

Responden yang merupakan ejen insurans bagi Merchantile Insurance Sdn. Bhd. menuntut bahawa ia telah melantik perayu sebagai ejen-kecilnya untuk menjual polisi-polisi syarikat insuran tersebut. Responden mengatakan, bahawa melalui perlantikan itu, perayu adalah diberi kuasa untuk, antara lainnya, menerima premium berhubung dengan nota-nota perlindungan (cover notes) yang telah dijualnya, tetapi berkewajipan untuk mengemukakan wang yang dikutipnya kepada responden selepas menolak komisyen yang harus dibayar kepadanya. Responden seterusnya mengatakan bahawa perayu telah gagal untuk membayar kepadanya premium-premium yang telah dikutip sedemikian rupa dan dengan itu telah membuat tuntutan baginya berjumlah RM175,124.41. Berikutan dengan penafian perayu mengenai apa-apa pengetahuan berhubung dengan tuntutan tersebut, responden telah mengeluarkan satu writ dan berikutan itu telah mengusul bagi mendapatkan penghakiman terus.

Perayu tidak mempertikaikan bahawa antara tahun 1990 dan 1991 penyata-penyata akaun telah dihantarkan kepadanya oleh responden. Di hadapan Hakim yang bijaksana, perayu sekali lagi memplid penafian yang semata-mata penafian. Walaubagaimanapun, setelah memplid demikian, perayu seterusnya memplid *in seriatim*, bahawa ejensi tersebut adalah haram, kerana telah melanggari Akta Pertubuhan Koperasi 1948 dan Akta Insurans 1963. Hakim yang bijaksana mendapati tidak ada isu-isu yang boleh dibicarakan dan berikutan itu telah memasukkan penghakiman bagi pihak responden. Dalam rayuan ini, perayu telah berhujah bahawa penghakiman terus telah dimasukkan secara salah oleh kerana Hakim, antara lainnya, telah tidak memberi perhatian kepada fakta bahawa tidak terdapat perjanjian bertulis untuk menyokong tuntutan responden bahawasa perayu telah dilantik sebagai ejen-kecilnya.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Cara bagaimana perayu telah memplid kesnya mendedahkan satu pendekatan yang tak konsisten. Adalah tidak boleh dibayangkan bahawa perjanjian sub-ejensi tersebut, yang mana menurut pembelaan, tidak pernah wujud, boleh menjadi haram. Jelasnya, pembelaan disini telah disampaikan hanya untuk melengahkan responden daripada mendapatkan penghakiman.

[2] Hujahan perayu tidak bermerit. Undang-undang tidak memerlukan bahawa perjanjian ejensi atau sub-ejensi haruslah bertulis. Bahagian X dari Akta Kontrak 1950 tidak mengandungi apa-apa keperluan bahawa perlantikan ejen atau sub-ejen haruslah secara bertulis. Dengan itu perlantikan tersebut mungkin secara nyata atau tersirat, iaitu ianya boleh dikumpulkan dari fakta-fakta dan keadaan-keadaan sesuatu kes dan daripada kelakuan pihak-pihak terbabit. Dalam ertikata yang lain, sesuatu pihak boleh, melalui kelakuannya, dalam keadaan kes yang tertentu, diestop daripada menegaskan ketiadaan perhubungan ejensi antara beliau dan mereka yang menuntut sebagai prinsipalnya.

[3] Dalam kes semasa ini, perayu telah mengakui bahawa ia telah menerima penyata-penyata akaun dari responden. Ianya mengikut bahawa seseorang yang dalam keadaan yang sama seperti perayu akan, sekiranya benar bahawa tidak terdapat perlantikan sub-ejensi, mengirimkan kembali akaun-akaun ini kepada responden dan menafikan apa-apa tanggungan. Perayu telah tidak melakukan perkara ini tetapi hanya menyimpan akaun-akaun tersebut dan tidak melakukan apa-apa.

[4] Perayu dengan bertindak sepi berserta dengan keadaan-keadaan lain yang wujud dalam kes ini, telah menggalakkan responden mempercayai bahawa ia (yakni perayu) tidak berniat untuk membangkitkan cabaran terhadap kewujudan perhubungan sah yang terdahulu antara mereka, atau kepada angka-angka yang ditunjukkan oleh akaun tersebut sebagai terhutang olehnya. Setelah melakukan sedemikian, ianya tidak seharusnya dibenarkan untuk kini menegaskan sebaliknya.

[Rayuan ditolak. Penghakiman terus Mahkamah di bawah diikrarkan]

Cases referred to:
Kuchwar Lime & Stone Co v. Dehri Rohtas Light Railway & Co. Ltd. AIR 1969 SC 193 ***(foll)***
Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd. [1995] 3 MLJ 331 ***(refd)***

Legislation referred to:
Contracts Act 1950, Part X
Co-operative Societies Act 1948
Insurance Act 1963

Other sources referred to:
Bowstead & Reynolds on Agency, 17th Edn., p. 55

For the appellant - Darshan Singh; M/s. Darshan Singh & Co., Penang
For the respondent - L. Andrew; M/s. Andrew & Co., Penang

JUDGMENT

Gopal Sri Ram JCA:

We heard and dismissed this appeal on 4 December 1995, without calling upon Counsel for the respondent to address us. The reasons for our decision now follow.

The respondent carries on the business of an insurance agent. Its case in the Court below rested on the fact that it had appointed the appellant as its sub-agent to sell policies of Mercantile Insurance Sdn. Bhd. to members of the public generally. The respondent claimed that under the aforesaid appointment, the appellant, as sub-agent, was authorised to receive proposal forms and to issue cover notes to vehicle owners who wished to purchase insurance cover.

It was also part of the respondent's pleaded case that under the terms of the sub-agency, the appellant was to effect sales of cover notes on a "cash before cover" basis. By that expression is meant that the ultimate consumer will not have his vehicle covered by insurance until and unless he paid for it in advance. The respondent also claimed that the appellant was, under the terms of its appointment as sub-agent, authorised to receive premiums in respect of the cover notes it had sold. From these sums, the appellant was entitled to deduct the commission due to it for making the sales. However, it was under an obligation to pay over the balance to the respondent.

It is not is dispute that between February 1990 and September 1991, the respondent sent statements of account to the appellant. These reflected the sales which the appellant had made and the monies that had been received by the appellant. At the material time, these accounts showed the appellant to be indebted to the respondent in the sum of RM175,024.41.

The respondent waited for payment, but none came. It consulted solicitors who wrote to the appellant a letter before action, dated 22 December 1992, demanding payment of the aforesaid sum.

Upon receiving this demand the appellant too consulted solicitors. They replied on 4 January 1993, denying any knowledge on the part of their client of the claim and requesting copies of several documents, including the agreement of sub-agency and a statement of account.

The respondent then caused writ to be issued and moved for summary judgment. The appellant delivered a defence in which it denied the sub-agency. It then went on to allege, among other matters, that the sub-agency was illegal because it contravened the provisions of the Co-operative Societies Act, 1948 and the Insurance Act, 1963 as well as the subsidiary legislation made under the latter. These other defences were not taken as alternative pleas. Instead they follow, one upon the other, *in seriatim*.

The way in which the appellant pleaded its case reveals a singular inconsistency of approach. By no stretch of the imagination could it be said that a sub-agency agreement which, according to the defence, never existed could be illegal. The way in which the defence has been cast left us with the distinct impression that it is an embarrassing pleading and delivered purely to delay the respondent from obtaining judgment in the action.

The learned Judge who heard the respondent's summons for judgment found no triable issues. He accordingly entered judgment in favour of the respondent.

Those are then the relevant facts.

In arguing the appeal, Encik Darshan Singh, of Counsel, said that the Judge was wrong in entering summary judgment and that he had overlooked two vital points in his client's favour. He said that if the learned Judge had addressed his mind to these two matters, he would have granted the appellant unconditional leave to defend the action. The two points are as follows.

First, the respondent had not produced any written agreement to support its claim that the appellant had been appointed as its sub-agent. Second, the appellant had, at the first available opportunity, when it received the letter before action, promptly asserted that it was in no way liable to the respondent. We were also referred to the affidavit that was filed on the appellant's behalf in which a challenge to the *locus standi* of the respondent was taken. The affidavit also denies that any privity of contract existed between appellant and the respondent.

These arguments are really without any merit and the learned Judge obviously saw through them.

In the first place, the law does not require that an agency or sub-agency agreement must be in writing. See *Bowstead & Reynolds on Agency*, 17th Edn., p. 55 *et seq.*

Further, Part X of the Contracts Act, 1950, which contains the relevant provisions on agency does not contain any requirement that the appointment of an agent or sub-agent has to be in writing or be evidenced in writing. Hence the appointment may be express or implied, that is to say, it may be gathered from the facts and circumstances of a case and from the conduct of the parties: see, *Kuchwar Lime & Stone Co v. Dehri Rohtas Light Railway & Co Ltd.* AIR 1969 SC 193.

Another way of stating the proposition is that a party may, by his conduct in all the circumstances of a particular case, be estopped from asserting the absence of an agency relationship between him and he who claims to be his principal.

Viewed in this way, we perceive that the key to the whole case lies in the conduct of the appellant in this case. Encik Darshan Singh, in response to a question put to him by a member of the panel hearing this appeal, frankly conceded that his client did indeed receive the statements of account of which we have earlier spoken. It follows that a reasonable man similarly circumstanced as the appellant would, if it were really true that there had been no appointment of sub-agency as later claimed by it, have, post haste sent these accounts back to the respondent and denied any liability.

But that is not what happened. The appellant remained silent, held onto the accounts, and did nothing about it. The denial by its solicitor's letter of 4 January 1993, came long after the delivery of the account.

When asked why his client had kept silent for a rather long period of time, Encik Darshan Singh's response was that his client was a large company and did not do anything until the letter before action was received. We trust that we will be forgiven if we are unable to detect the logic in this response.

We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.

To put it another way, the appellant, by its silence coupled with the other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having done so, it ought not to be permitted to now contend otherwise.

It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and is now beyond question. See *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 3 MLJ 331.

Having carefully read the judgment of the learned Judge, we were unable to detect any error in reasoning in the way in which he approached the case. This is eminently a fit case for the exercise of the summary power to enter judgment.

The appeal was accordingly dismissed with costs. The order of the learned Judge was affirmed. The deposit paid into Court by the appellant was directed to be the paid out to the respondent to account of its taxed costs.

Reported by W.A. Sharif